

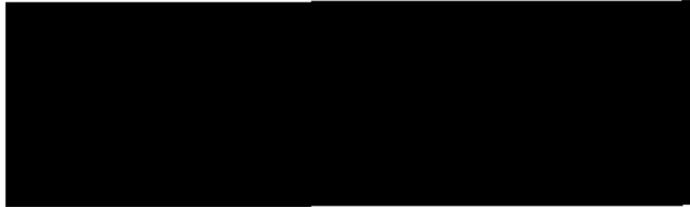
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **AUG 06 2012**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center, on September 19, 2003; however, on March 21, 2012 the Director, Texas Service Center, revoked the approval of the immigrant petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the director's decision.

1. Facts and Procedural History

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The Vermont Service Center director initially approved the petition on September 19, 2003.

On March 9, 2009 the director of the Texas Service Center (the director) sent the petitioner Notice of Intent to Revoke (NOIR) stating:

The Service [U.S. Citizenship and Immigration Services or USCIS] is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to ██████████, the petitioner's attorney].²

The director advised the petitioner in the NOIR to submit additional evidence to show that (a) the petitioner complied with all of the DOL recruiting requirements and (b) the beneficiary possessed two years of work experience in the job offered before the labor certification application was filed with the DOL.

Responding to the director's NOIR, ██████████ submitted the following evidence:

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

² The AAO notes that ██████████ was under USCIS investigation at the time the NOIR was sent. USCIS suspected that ██████████ submitted fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. ██████████ has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. ██████████ representations in this matter will be considered; however, he will not be sent a copy of this decision. He will be referred to throughout this decision as previous counsel or by name.

- Copies of the newspaper tear sheets for the position offered, published in the *Boston Herald* on Sunday, January 28, 2001; Sunday, November 18, 2001; Sunday, November 25, 2001; Monday, November 26, 2001; Wednesday, November 28, 2001; Thursday, November 29, 2001; Friday, November 30, 2001; and Saturday, December 1, 2001;
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A signed statement dated March 30, 2009 from the beneficiary stating that he cannot provide evidence to demonstrate that he was a cook at his previous employment in Brazil since it has been a long time and because all of the employees and directors have changed; and requesting consideration of his nine years of experience as a cook at [REDACTED] [REDACTED] as evidence of his qualifications for the job offered.

[REDACTED] also claimed that the beneficiary no longer worked for the petitioner and had ported in accordance with section 204(j) of the Act. The record contains letters dated July 25, 2005 and dated March 20, 2009 from [REDACTED] and [REDACTED] respectively, who state that the beneficiary has been employed by [REDACTED] since April 9, 2001 as a fry cook.

Upon review of the evidence submitted above, the director issued a Notice of Revocation (NOR) on May 20, 2009 finding that the beneficiary did not have the requisite experience in the job offered before the priority date. The director also concluded the petitioner failed to show that it followed the DOL recruitment regulations when applying for labor certification on behalf of the beneficiary. First, the director stated that the petitioner failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. Secondly, the director stated that the submission of the copy of the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* showed that [REDACTED] had paid for and created the advertisement for the job offered and impermissibly participated in the consideration of the U.S. applicants. Finally, the director noted that the petitioner signed the Form ETA 750 on January 5, 2001. The director stated that the petitioner could not have declared that it had completed the recruitment efforts on January 5, 2001 when, according to the evidence submitted, the petitioner appeared to have not begun recruiting by placing an advertisement in the newspaper. For these reasons, the director concluded that the petitioner did not conduct good faith recruitment and accordingly, revoked the approval of the petition.

On January 10, 2011 the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5). The director withdrew the decision issued on May 20, 2009 (the NOR) and reinstated the approval of the petition.

On December 6, 2011 the director sent another Notice of Intent to Revoke (NOIR) to the petitioner. In this NOIR, the director indicated that the petitioner signed the Form ETA 750 on

January 5, 2001 before conducting the recruitment process.³ The director stated that the recruitment process, according to the evidence submitted, began when ██████████ placed an order with the *Boston Herald* in February 2001 to advertise the position online at jobfind.com. The petitioner was advised by the director to outline the specific steps that the petitioner took to conduct good faith recruitment, e.g. other than the advertisements in the *Boston Herald*. The petitioner was also asked to identify the recruitment source by name, to state how many candidates were interviewed, to explain whether and how the petitioner conducted interviews and determined that no other U.S. candidate was eligible for the position, and to specify whether and for how long the company posted an in-house posting notice recruiting for the position. The director requested the petitioner to submit copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position.

The director also indicated in the NOIR that the name of ██████████ Owner, had been replaced by ██████████ Chef. The director requested that the petitioner provide additional evidence to show that ██████████ was authorized to file the Form ETA 750 and the Form I-140 petition on behalf of the petitioner.

Further, the director found that the undated letter of employment from Barbacoa Classic did not include a specific description of the experience or training received in accordance with 8 C.F.R. § 204.5(g)(1), and did not establish the beneficiary's qualifications.⁴ The director also found the evidence inconsistent with respect to the identification of the beneficiary's Brazilian employer, and that Barbosa Classic and Barbacoa Classic are not related entities.⁵

³ By signing the Form ETA 750, the petitioner essentially stated to the DOL under a penalty of perjury attestation clause that the recruitment effort was complete and yielded no qualified United States workers.

⁴ In pertinent part, 8 C.F.R. § 204.5(g)(1) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

See also 8 C.F.R. § 204.5(l)(3)(ii)(A).

⁵ The record contains an undated letter from ██████████, in which ██████████ indicates that she is the co-owner of Barbosa Classic and that the beneficiary worked at the establishment from September 1, 1986 to January 31, 1992. This appears to be a translation error, as the attached original indicates the name of the establishment as Barbacoa.

The petitioner was instructed to submit, among other things, copies of the beneficiary's pay stubs, payroll records, tax documents, financial statements, to demonstrate that the beneficiary worked as a cook at Barbacoa Classic from 1986 to 1992 and a copy of a government issued identification card reflecting where the beneficiary worked and lived between 1986 and 1992.

Moreover, the director determined that the petitioner had not established the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his lawful permanent residence. The director noted that the petitioner had established the ability to pay the proffered wage in 2001 but not in 2002 and thereon until the beneficiary obtains his lawful permanent residence.

Finally, the director stated that the petitioner is required to maintain its intention to employ the beneficiary as the petition remains pending at this time. The director requested that the petitioner provide the following evidence:

- An original letter stating that the petitioner intends to employ the beneficiary.

Neither Mr. Dvorak nor the petitioner responded to the director's NOIR.

On March 21, 2012 the director revoked the approval of the petition, invalidated the labor certification, and certified the matter to the AAO, pursuant to 8 C.F.R. § 103.4(a).⁶ In the Notice of Certification, the director concluded that (1) the petitioner had failed to follow the DOL recruitment procedures in recruiting U.S. workers, (2) [REDACTED], the chef who signed the Forms ETA 750 and I-140 petition, was not authorized to represent the petitioner in the instant proceeding; (3) the beneficiary did not have the requisite work experience in the job offered as of the priority date, and (4) the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date.

The AAO agrees. We find, after reviewing the evidence of record, that the director had good and sufficient cause to revoke the approval of the petition and to invalidate the labor certification.

2. Sufficiency of Notice to the Petitioner

With respect to the director's decision to revoke the approval of the petition, section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

⁶ Certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

However, before the director can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

(a) *General*. Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (emphasis added).

In addition, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director provided the petitioner with notice of the derogatory information specific to the current proceeding. In the NOIR dated December 6, 2011 the director specifically requested the petitioner to outline the specific steps that the petitioner took to conduct good faith recruitment and to submit corroborating evidence such as copies of the in-house posting notice and the advertisements in the newspapers. The director also asked the petitioner to submit additional evidence to demonstrate that it authorized its chef, [REDACTED], to sign the Form ETA 750 and Form I-140 petition.

Further, in the NOIR dated December 6, 2011 the director specified the problems in the record pertaining to the beneficiary's prior work experience as a cook in Brazil and asked the petitioner

to remedy the problems by submitting independent objective evidence to demonstrate the beneficiary's employment in Brazil.

Moreover, the director specifically advised the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date. The director also pointed out other problems in the certified Form ETA 750, such as: (a) the stamped number "10903" at the upper right hand of the Form ETA 750 was covered by correction fluid and the number "11365" was handwritten in its place; (b) the date on which the Form ETA 750 was received by the local office has been covered by correction fluid and the date "6-25-01" was handwritten in the block; (c) the occupational title of the proffered job has been covered and "Cook" has been inserted; and (d) the name of [REDACTED] on the Form ETA 750 has been replaced by [REDACTED].

The petitioner has not submitted any independent objective evidence in response to the director's NOIR dated December 6, 2011 or to the director's Notice of Certification dated March 21, 2012 resolving the specific deficiencies/problems described above. Such evidence, if provided, would have shed more light on the beneficiary's work experience in Brazil and his qualifications for the proffered job. It would also demonstrate whether the petitioner authorized its chef, [REDACTED], to file the Form ETA 750 and Form I-140 petition, whether the petitioner followed the DOL recruitment procedures, and whether the petitioner has the ability to pay the proffered wage from the priority date. The director provided the petitioner with specific derogatory notice and the opportunity to respond. The director's NOIR and the decision to revoke the approval of the petition are based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

3. Invalidation of the Labor Certification based on Fraud or Willful Misrepresentation

In the December 6, 2011 NOIR, the director, among other things, stated that the petitioner did not establish the *bona fides* of the recruitment process in that the petitioner failed to respond to establish that its chef, [REDACTED], was authorized to conduct the recruitment and to file the Forms ETA 750 and I-140; that it did not conduct recruitment in accordance with DOL procedures as [REDACTED] signed the Form ETA 750 prior to conducting recruitment, although he certified under penalty of perjury that recruitment was complete as of the date of filing;⁷ and that the petitioner had falsified the Form ETA 750 submitted for the record when the priority date of

⁷ Specifically, the director stated:

[REDACTED] signed the ETA 750 on January 5, 2001. [REDACTED] signed the labor certification application before conducting the recruitment beginning with the placement of the advertisements in February 2001. The confirmation by the *Boston Herald* of February 14, 2001 indicates the advertisement for the position as cook was advertised on jobfind.com after [REDACTED] signed the labor certification.

February 12, 2001 was whited out and replaced by a hand-written date of June 25, 2001.⁸ For the reasons stated above, the director concluded that there might be fraud or willful misrepresentation involving labor certification.

The AAO agrees. The director has provided the petitioner with notice of the derogatory information specific to the current proceeding. In the December 6 2011 NOIR, the director specifically requested the petitioner to submit additional evidence such as copies of the in-house posting notice and an outline explaining how many candidates were interviewed for the instant petition, how these interviews were conducted, and how it was determined that no other U.S. candidates were eligible for the position to demonstrate that the recruitment was conducted in good faith. The director specifically requested that the petitioner submit evidence to establish that Charles A. Smith was authorized to sign the Forms ETA 750 and I-140.

No response or additional evidence as requested has been provided or submitted. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Neither USCIS nor the AAO will be able to substantively adjudicate the petition or appeal without a meaningful response to the line of inquiry set forth in the director's NOIR.

USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

The record reflects that the form ETA 750 was altered as the director described in the Notice of Certification dated March 21, 2012, and that such alterations were not approved by the DOL, as they were not initialed and dated. Further, it appears that the priority date of the Form ETA 750 is February 12, 2001, as the record contains a letter from the Commonwealth of Massachusetts Division of Employment and Training Alien Labor Certification Unit addressed to [REDACTED] dated February 16, 2001 which indicates that the petitioner has filed a Form ETA 750 with the

⁸ This date reflects the priority date which is the date when the Form ETA 750 was received by DOL for processing.

case number of “20010903.” The same last five-digit number – 10903 – also appears on the upper right hand corner of the approved Form ETA 750 although the number has been covered by liquid white-out.⁹ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security’s delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other “appropriate action.” DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to an alien’s eligibility for the requested immigration benefit or that alien’s subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or by willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹⁰

⁹ The number 10903 appears in red showing through a coat of liquid white ink. The number “11365” was handwritten next to the liquid white ink.

¹⁰ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, or after the petition is automatically revoked, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [she] determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that much of the petitioner’s documentation with respect to the labor certification has been falsified, a finding that the petitioner did not challenge in that the petitioner did not respond to the director’s NOIR dated December 6, 2011 or the Notice of Certification dated March 21, 2012.

A material issue in this case is whether the labor certification is valid. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.*

inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The director has laid out in specific details all of the inconsistencies that appear on the approved labor certification and requested that the petitioner submit additional evidence to resolve the allegation that the labor certification was falsified. No evidence or explanation has been submitted to rebut the director's allegation that the approved labor certification was willfully altered and falsified. Such evidence is material because, if it were provided, it would demonstrate that the labor certification application was authorized by the petitioner, that the recruitment was conducted in accordance with DOL procedures, and that the approved labor certification was not falsified prior to submission. The petitioner's failure to submit additional evidence creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the noted inconsistencies, and considering that the petitioner received notice of the inconsistencies and did not resolve them through counsel, and that the petitioner failed to respond, the AAO finds that the petitioner has deliberately concealed and willfully misrepresented facts about the validity of the labor certification.¹¹ Although the petitioner in this case presented a permanent labor certification, the labor certification appears to have been

¹¹ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

altered and to have not been authorized by the petitioner. The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d).

In this case, USCIS Vermont Service Center was unable to make a proper investigation of the facts when determining eligibility for the benefit sought, because the petitioner shut off a line of relevant inquiry by submitting a fraudulent or falsified document. If USCIS Vermont Service Center had known the true facts, it would have denied the employer's petition, as the Form ETA 750 was falsified. In other words, the concealed facts, if known, would have resulted in the outright denial of the petition. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By submitting a fraudulent document to USCIS, the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. See also *Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, it is proper for USCIS to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182.

The director's decision to invalidate the certified Form ETA 750 is affirmed as evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the labor certification.

4. Beneficiary's qualifications for the job offered

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on June 25, 2001 (or February 12, 2001 had the Form ETA 750 not been altered). The name of the job title or the position for which the petitioner seeks to hire is "Cook." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of June 25, 2001 or February 12, 2001 (the priority date) is material in this case, since the beneficiary must qualify for the job offered in the labor certification as of that date for visa eligibility.

The only evidence submitted to demonstrate the beneficiary's qualifications is a letter from [REDACTED], co-owner of [REDACTED] stating that the beneficiary worked from September 1, 1986 to January 31, 1992 as a cook – chef. The AAO agrees with the director that the letter of employment for the beneficiary from Barbacoa Classic does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), in that it does not contain a description of the beneficiary's duties. Simply stating that the beneficiary worked as a cook is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

When requested to submit additional evidence to confirm the beneficiary's employment as a cook in Brazil, the petitioner submitted a signed statement by the beneficiary stating that he could not produce any other evidence since "it had been a long time and because all of the employees and directors had changed." The petitioner did not submit a copy of the beneficiary's social security or employment booklet, or government-issued identification card showing where he worked between 1986 and 1992.

In addition, the AAO notes that the beneficiary failed to include his employment with Barbacoa Classic on the Form G-325 (Biographic Information), which he filed along with the Application to Register Permanent Residence or Adjust Status.

Finally, the beneficiary's employment with [REDACTED] cannot be used to show that the beneficiary qualifies for the job offered. As noted above, the beneficiary must have at least two years of work experience in the job offered before the priority date (or prior to either June 25, 2001 or February 12, 2001). It does not appear from the evidence submitted that the beneficiary was hired as a cook by [REDACTED] two years prior to the priority date.¹²

Additionally, the beneficiary did not include his employment at Kelly's Roast Beef of Natick in the Form ETA 750, part B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

For the reasons stated above, the AAO finds that the beneficiary does not qualify to perform the duties of the position.

¹² The beneficiary stated in his signed statement dated March 30, 2009 that he had worked at [REDACTED] as a cook for the past nine years. The letter dated March 20, 2009 from [REDACTED] does not state when the beneficiary was hired.

5. Ability to Pay

Moreover, the petition is not approvable because the record does not contain sufficient evidence to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on June 25, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$13.01 per hour or \$23,678.20 per year based on a 35 hour work week.¹³

To show that the petitioner has the continuing ability to pay \$13.01 per hour or \$23,678.20 per year from June 25, 2001, the petitioner submitted a copy of the beneficiary's Form W-2 for 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the

¹³ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Based on the evidence submitted, the beneficiary received the following compensation from the petitioner in 2001:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2001	\$32,739.59	\$23,678.20	Exceeds the PW

Therefore, the petitioner has established the ability to pay in 2001 but not in 2002 and thereafter until the beneficiary obtains his lawful permanent residence. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of \$13.01 per hour or \$23,678.20 per year from June 25, 2001 until the beneficiary obtains legal permanent residence, or until the beneficiary ported to work for another employer in a similar job, assuming that section 204(j) of the Act applies in this instant proceeding.¹⁴

¹⁴ As noted earlier, [REDACTED] claimed earlier that the beneficiary had ported to work for another employer, pursuant to section 204(j) of the Act, which provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. This section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); also see *Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

On the subject of porting, the AAO notes that where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹⁵ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record, however, contains no evidence showing the petitioner’s net income or net current assets from 2002. No evidence such as copies of the business’ federal tax returns, annual reports, or audited financial statements for the years 2002 and thereafter has been submitted. Due to this lack of evidence, the AAO affirms the director’s conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage of the beneficiary in this case from the priority date.

Finally, USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee

¹⁵ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. Given that the petition's approval has been revoked and the fact that the petitioner failed to respond to any of the director's Notices of Intent to Revoke, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision to revoke the previously approved petition and to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED], is affirmed.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number [REDACTED] filed by the petitioner is invalidated.